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The Contract Clause: A Constitutional Basis for Invalidating State Legislation

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THE CONTRACT CLAUSE: A CONSTITUTIONAL BASIS FOR INVALIDATING STATE LEGISLATION

The contract clause of the United States Constitution[1] has been the subject of speculation as to whether it could provide any basis for prohibiting state legislative action.[2] Until recently, this speculation was well deserved.[3] Two cases decided by the Supreme Court in 1977[4] and 1978,[5] however, should put an end to the idea that the contract clause is a "dead letter." In these cases, the Supreme Court has revitalized the contract clause, both by showing that these prohibitions retain some potence and by broadening the scope and application of the clause's prohibitions, even when construed as limited by the reserved powers of the state.[6]

This comment begins with an analysis of the historical development of the contract clause and the Court's development of contract clause protections. This development is then compared with the development of the due process clause of the Constitution to demonstrate the consistencies in the Court's treatment of economic interests under both constitutional provisions. An examination of two recent Supreme Court decisions follows to demonstrate the change in the scope of contract clause protections affected by the Court's analysis and to examine its

1. U.S. CONST. art. I, § 10, cl. 1. The contract clause provides that: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

2. *See, e.g.*, City of El Paso v. Simmons, 379 U.S. 497, 517 (1965) (Black, J., dissenting) (dissenting from "the Court's balancing away the plain guarantee of Art. I § 10"); H. CHASE & C. DUCAT, CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 105 (1974 ed.) ("Today the clause is of negligible importance, and might well be stricken from the Constitution. For most practical purposes, in fact, it has been.").

3. The last Supreme Court case, prior to 1977, to hold state action unconstitutional as violative of the contract clause is Wood v. Lovett, 313 U.S. 362 (1941) (1937 repeal of 1935 Arkansas law protecting tax sale purchasers from attack on procedural irregularities).

4. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

5. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

6. Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 439 (1934).

Reserved power is that power the state retains to act in the general welfare. Reserved power exercises are often characterized as police power exercises (although the reserved power also includes power of eminent domain). The terms will, therefore, be used interchangably. Manigault v. Springs, 199 U.S. 473, 480 (1905), first recognized that contract clause prohibitions are subject to reserved power exercises.

effect on future litigation. Finally, the contract clause as presently interpreted is compared with the due process clause to demonstrate that economic interests now receive different treatment depending upon how that interest is characterized.

I. BACKGROUND

A. Historical Interpretation

It is generally acknowledged that the contract clause was adopted to rectify economic conditions prevalent under the Articles of Confederation,[7] although this purpose is not evident in the debates of the Constitutional Convention.[8] Widespread economic depression existed following the Revolutionary War, leading many states to enact debtor relief statutes. These legislative schemes undermined confidence in the economy and made prosperous trade impossible.[9] Business persons were unwilling to enter any transaction that involved credit because of the propensity of state legislatures to abrogate later these credit agreements by legislative fiat. The Framers sought to ensure stability for the debtor-creditor relationship by adopting the contract clause, which would prevent future state interference with debtor-creditor relationships. The need for the clause is noted in Chief Justice Marshall's dissent to *Ogden v. Saunders*:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the

7. *See, e.g.*, THE FEDERALIST No. 44 (J. Madison) at 319 (Belknap Press 1966) ("Our own experience has taught us, nevertheless, that additional fences against these dangers ought not be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights . . . ."); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-28 (1934); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354-55 (1827); Hale, *The Supreme Court and the Contract Clause* (pt. 1), 57 HARV. L. REV. 512, 512-13 (1944) [hereinafter cited as Hale].

8. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 439-41, 448-49, 597, 619, 636 (rev. ed. M. Farrand 1966).

9. *See* Allied Structural Steel v. Spannaus, 438 U.S. 234, 256 (1978) (Brennan, J., dissenting) ("The economic depression that followed the Revolutionary War witnessed 'an ignoble array of [such State] legislative schemes'.") (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934)).

> sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.[10]

Although, as adopted, the contract clause was intended to prevent state legislative interference with debtor-creditor contracts, initial interpretations of the clause did not confine its application to that limited situation.[11] *Fletcher v. Peck*,[12] the first case construing the contract clause, extended the application of the clause's prohibitions to contracts to which the state was a party. *Fletcher* involved a situation arising from the great Yazoo land scandal. The state legislature had sought to rescind land grants procured by bribery. The Court unanimously held that the contract clause prohibited rescission of these land grants. In doing so, the Court had to find that the clause applied to contracts to which the state was a party, as well as to private contracts.[13]

Applicability of the clause to contracts to which the state was a party was reaffirmed in *Dartmouth College v. Woodward*.[14] In *Dartmouth* the Court held that a corporate charter, such as the one issued to Dartmouth College, was a contract, and that in the absence of an *express* reservation by the state of the power to modify, it could not be impaired by state law without violating the contract clause.[15]

The early expansion of the contract clause's area of application was accompanied by two decisions that limited the actual application of the

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10. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354-55 (Marshall, C.J., dissenting).

11. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 420 (1978); B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 41-44 (1967). *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (Georgia's repeal of land grant declared unconstitutional); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (repeal of act exempting Indian land from tax liability declared void); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (act attempting to alter corporate charter is unconstitutional).

12. 10 U.S. (6 Cranch) 87 (1810). Chief Justice Marshall's opinion is permeated with notions of "natural law." *Fletcher* can be read as striking down the state legislation on either a contract clause or natural law basis. Justice Johnson's concurring opinion finds the statute invalid on only a natural law basis. *Id.* at 143. Natural law, a doctrine in great favor in the nation's early history, was based on the concept that some rights, particularly property rights, are immune from government legislation because these rights predate the government and are essential to the continued existence of the government. *See generally* T. COOLEY, THE GENERAL PRINCIPALS OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA Chapter XVI (3d ed. A. McLaughlin 1898); 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. Carrington 1927).

13. 10 U.S. (6 Cranch) at 137.

14. 17 U.S. (4 Wheat.) 518 (1819). *See also* New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812).

15. 17 U.S. (4 Wheat.) at 641. As a result of this decision states have consistently retained the right to modify corporate charters. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 424 (1978).

clause prohibitions. In *Ogden v. Saunders*,[16] the Court held that the prohibitions of the clause extend only to legislation that retrospectively affects the obligations of contract. As stated by the Court, "[t]he most obvious and natural application . . . is to laws having a retrospective operation upon existing contracts."[17] The concept that a contract, at least for contract clause purposes, includes the laws existing at the time of its making is derived from *Ogden*.[18]

Sturges v. Crowninshield[19] is responsible for the second limitation. *Sturges* established that, for the purposes of contract clause litigation, there is a distinction between the obligation and the remedy for enforcing it. As noted by the *Sturges* Court:

> The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.[20]

Although the remedy-obligation analysis has changed somewhat in application,[21] the distinction continues to allow a state to enact legislation that modifies the contractual remedy without necessitating its impairment.

In the nation's first century,[22] the contract clause was the most widely used protection of individual property rights against state regulation.

> Before 1889 the contract clause had been considered by the Court in almost forty per cent of all cases involving the validity of state legislation. So successfully was its protection invoked that it was the constitutional justification for seventy-five decisions in which state laws were held unconstitutional, almost half of all those in which such legislation was declared invalid by the Supreme Court.[23]

The contract clause began to diminish in importance in the late nineteenth century, as the Court began to recognize a new theory, based on the due process clauses of the fifth and fourteenth admendments, to protect individual property rights from state regulation. This theory,

16. 25 U.S. (12 Wheat.) 213 (1827).

17. *Id.* at 303.

18. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 429-30 (1934). United States Trust Co. v. New Jersey, 431 U.S. 1, 19-20 n.17 (1977).

19. 17 U.S. (4 Wheat.) 122 (1819).

20. *Id.* at 200. The remedy can be modified without impairing the obligation of contract provided no substantial right secured by the contract is thereby impaired. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 19-21 & n.17 (1977).

21. United States Trust Co. v. New Jersey, 431 U.S. at 19-21 & n.17.

22. B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 95 (1938).

23. *Id.*

called substantive or economic due process, allowed the Court to examine the substance of legislation and the ends to which the legislation was aimed and to determine independently if the legislation violated the liberty and property protections afforded by those amendments.[24]

The due process theories that developed provided greater flexibility than the contract clause because their protections extended to the federal government as well as to state governments, they did not require the existence of a contract, and did not only prohibit retrospective legislation. This greater flexibility induced the Court to rely on the substantive due process doctrine rather than on the contract clause.[25] These two theories were really used to accomplish the same result and it was, therefore, inevitable that the turn-of-the-century Court would use the more flexible one. Under both theories the Court could decide that legislation infringed on property rights, including those rights based on contract. In the 1930's, the application of the doctrine of substantive due process began to decline, as did the importance of the contract clause. In analyzing legislation, the Court began to defer to the legislative judgment, determining that it was not the Court's function to decide the need for and wisdom of legislation.[26] The deference analysis under both the contract clause and substantive due process theories was generally parallel, up through 1977.[27]

B. Blaisdell *Interpretation*

A 1934 decision, *Home Building & Loan Association v. Blaisdell*,[28] is the forerunner of modern contract clause jurisprudence. Although *Blaisdell* established a strict test by which legislation impairing the obligation of contract is to be evaluated, the theories expounded in the *Blaisdell* decision have been used by subsequent courts as precedent for lenient evaluation of state legislation that impairs contracts.[29]

In *Blaisdell*, a Minnesota statute that established a moratorium on the foreclosure of mortgages was challenged as violating the contract

24. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 661 (1887) (while the challenged statute here was enacted within the state police powers, there are limits to legislative action and the judiciary determines if the limits have been surpassed); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (Court determines if and when state legislature surpasses its authority); Lochner v. New York, 198 U.S. 45 (1905) (Court determines that statute regulating baker's hours has no legitimate purpose).

25. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 425 (1978). *See* notes 123-128 *infra* and accompanying text for a discussion of substantive due process.

26. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).

27. *See* notes 170-175 *infra* and accompanying text.

28. 290 U.S. 398 (1934).

29. *See, e.g.*, City of El Paso v. Simmons, 379 U.S. 497 (1965).

clause. Specifically, the statute provided a judicial procedure by which sales on foreclosed real estate could be postponed and periods of redemption extended. The legislation was to remain in effect only for the duration of the declared emergency, the economic depression of the 1930's, or for a statutorily established time limit, whichever occurred first.[30]

This foreclosure moratorium was upheld against a contract clause challenge.[31] In finding the legislation constitutional, the Court noted that past application of the contract clause has "put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."[32] The Court identified as an impairment of contract the change in foreclosure provisions because it significantly altered the contract remedies. Although the Court found this remedy impairment to be within the broad constitutional concept of contract impairment, the legislation was upheld as a valid exercise of the state police power.[33]

In upholding the legislation, the Court established new standards by which to evaluate the validity of legislation impairing the obligations of contracts. The inquiry is not simply whether an obligation is impaired, but rather "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."[34] This flexible standard allows the Court to construe the contract clause prohibitions in harmony with the state police power and to hold a statute valid as a legitimate exercise of the police power even if the statute impairs contractual obligations.

The contract clause analysis that derives from *Blaisdell* parallels the economic due process approach that derives from *Nebbia v. New*

30. 290 U.S. at 415-19.

31. *Id.* at 447-48.

32. *Id.* at 428.

33. *Id.* at 447-48. *Blaisdell*, significantly, is the first case in which the Court goes beyond the explicit language of the contract clause to resolve a contract clause question. The theory, however, that a contract impairment can be constitutionally justified as an exercise of the state's reserved powers is older than *Blaisdell*. In Manigault v. Springs, 199 U.S. 473 (1905), the Court said,

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Id. at 480.

34. 290 U.S. at 438.

York,[35] a case decided the same year as *Blaisdell*. Both cases used an ends-means analysis, and gave a certain degree of judicial deference to the legislative determination of the legitimacy of the end.[36] The ends-means analysis basically requires that the ends sought by the legislation be legitimate and that the means used to attain that end be rational.

While an ends-means test is flexible and lends itself to a loose interpretation, the *Blaisdell* Court removed this flexibility by adding a five-factor test that must be satisfied before the legislation working the contract impairment could be found valid.[37] The legitimacy of the ends and the reasonableness of the means were judged by the following five factors: (1) an emergency must exist that furnishes a "proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community;"[38] (2) the legislation must be for the protection of a basic interest of society, not for the mere advantage of particular individuals;[39] (3) the relief must be appropriate to the character of the emergency that existed;[40] (4) the conditions of the legislation must be reasonable;[41] and (5) the legislation must be temporary and limited to the exigency that called it forth.[42]

The Court found each of these five factors satisfied in *Blaisdell*. First, the Court found that the required emergency existed to furnish the occasion for the exercise of the state police powers. The Court took judicial notice of the economic depression and the effects of the depression on the real estate market. Recognizing that without this legislation there would be a loss of homes that furnish shelter and the means of subsistence in the state, the Court decided that this first factor was satisfied.[43]

Second, the Court found that the legislation was for the protection of a basic interest of society, not merely for the advantage of particular

35. 291 U.S. 502 (1934) (upholding price control on milk).

36. In *Nebbia*, the state of New York had established a regulatory board that had the authority to set minimum prices for the retail sale of milk. The Court sustained the legislation as a legitimate exercise of the state's police power. The *Nebbia* Court stated that the Court's function "is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." *Id.* at 536. The decision contained language suggesting that the Court's use of the substantive due process doctrine to invalidate economic or welfare legislation was at an end.

37. 290 U.S. at 444-48.

38. *Id.* at 444.

39. *Id.* at 445.

40. *Id.*

41. *Id.* at 445-47.

42. *Id.* at 447-48.

43. *Id.* at 444-45.

individuals. While the Court did not elaborate on its findings in this area, the legislation itself made it apparent that large masses of the state's population would be affected.[44] Third, the Court noted that the legislation was appropriate to the emergency. Because the legislation was to remain in effect no longer than the existence of the emergency and its use was limited, its character was appropriate to the emergency.[45] Fourth, the Court found that the conditions imposed by the legislation were reasonable because the indebtedness continued to run and the mortgagee was still bound by the loan contract.[46] Factors three and four above can be characterized as inquiries into the severity of the impairment. Examining the severity is actually an analysis of the reasonableness of the means used. Fifth, the legislation questioned was temporary because it was to expire by a specified date or at the end of the exigency, whichever occurred first.[47]

C. Modern Interpretation

The five-factor *Blaisdell* test was actually an extension of the substantive due process test existing at that time. The first factor of the test examines the legitimacy of the legislative ends and enables courts to determine independently if the legislative purpose is valid; the remaining factors focus on the reasonableness of the means chosen to meet that end.

Subsequent contract clause decisions have liberalized the *Blaisdell* test and eliminated the five-factor analysis. The evolution began in *W.B. Worthen Co. v. Thomas*,[48] a case decided in the same term as *Blaisdell*. In *Thomas*, the appellee Thomas and her husband became indebted to appellant Worthen for the rent of premises leased to the husband-wife partnership by Worthen. A judgment was entered on the amount due but the husband died before this amount was paid. Worthen then served a writ of garnishment against an insurance policy that was issued on the husband's life, and of which Mrs. Thomas was the beneficiary.[49]

A few days after the writ of garnishment was issued, the Arkansas legislature passed a statute prohibiting garnishment for a debt of certain insurance benefits, including life insurance.[50] When Worthen was

44. *Id.* at 445.
45. *Id.*
46. *Id.* at 445-47.
47. *Id.* at 447-48.
48. 292 U.S. 426 (1934).
49. *Id.* at 429.
50. *Id.* at 429-30.

prohibited by the statute from exercising its garnishment rights, it challenged the statute as violative of the contract clause. The Court examined the statute and found that it did impair the contract between Thomas and Worthen by exempting some future acquisitions, that is, insurance benefits, from property available to settle contract debts.[51] However, merely isolating the existence of a contract impairment did not end the contract clause analysis. The *Thomas* Court recognized that *Blaisdell* requires that the contract clause limitations be construed in harmony with the state's reserved power available "to protect the vital interests of its people."[52] This recognition brought the Court to an ends-means analysis: Are the ends legitimate and the means reasonable? The Court noted that *Blaisdell* allows for a statutory impairment if the conditions requiring the impairment are brought about by an emergency. However, the *Thomas* Court noted that, even assuming the existence of an emergency that would legitimize the ends of this legislation, the means used to achieve these ends were *not* reasonable.[53] "[T]he legislation was not limited to the emergency and set up no conditions apposite to emergency relief."[54] In contrast, the statute validated in *Blaisdell* limited its relief to, at most, the existence of the emergency creating the need for the legislation. Thus, the *Thomas* Court found that the Arkansas statute satisfied neither the fifth factor of the *Blaisdell* test (temporariness) nor the standard of "reasonable means."[55] The statute was, therefore, held unconstitutional.

Thomas is significant in that it involves the classic contract clause problem, a statute impairing a debtor-creditor relationship. It is necessary to recall that the contract clause was adopted to prevent state interference with precisely these kinds of relationships.[56] In *Thomas*, the Court used both the five-factor *Blaisdell* analysis (although it only had to analyze the last factor to find the test was not fulfilled) and, more significantly, the substantive due process ends-means analysis of *Blaisdell* to determine that the legislation violated the contract clause.

In *W.B. Worthen Co. v. Kavanaugh*,[57] the Court grappled further with the tests set down in *Blaisdell* and with their application to state

51. *Id.* at 431-34.
52. *Id.* at 432-33 (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)).
53. 292 U.S. at 433.
54. *Id.* at 432.
55. *Id.* at 434. "In the instant case, the relief sought to be afforded is neither temporary nor conditional . . . . We find the legislation, as here applied, to be a clear violation of the constitutional restriction." *Id.*
56. *See* notes 7-10 *supra* and accompanying text.
57. 295 U.S. 56 (1935).

legislation impairing contracts. *Kavanaugh* involved state legislation that extended the period of foreclosure after assessment on municipal bonds. The foreclosure extension left the bondholder without an effective remedy for at least six and one-half years and during that period there was no enforceable obligation to pay installments of principal or accruing coupons. The legislation was passed under a declaration of emergency.[58]

The bondholders contested the validity of these statutory changes as being in violation of the contract clause.[59] The *Kavanaugh* Court agreed that the statute unconstitutionally impaired a contractual obligation.[60] The main basis for invalidating the legislation was the Court's finding that the legislative means used to implement the changes in the foreclosure provision were not reasonable. The Court contrasted the six and one-half year period of foreclosure moratoriums with the two-year period in *Blaisdell*. The Court also noted that, in *Blaisdell*, the debtor was required to pay at least the rental value of the property during the moratorium and that no similar provision was made in the *Kavanaugh* statute.[61]

Significantly, the *Kavanaugh* decision did not mention the five-factor test of *Blaisdell*. Rather, the Court analyzed the contract impairment on the basis of an ends-means analysis. In utilizing this ends-means analysis, the *Kavanaugh* Court's analysis paralleled the analysis that was beginning to emerge in substantive due process litigation. *Kavanaugh* was decided between *Nebbia v. New York*[62] and *West Coast Hotel v. Parrish*.[63] In that period, the Court was coming to grips with a theory that would require it to defer to the legislative evaluation of the legitimacy of the ends of the legislation, instead of allowing the Court to decide if those ends were legitimate. As a step toward that, the *Kavanaugh* Court took a liberal view of the permissible scope of the legislative ends. The *Kavanaugh* Court accepted the state legislature's declaration of an emergency and did not attempt to undertake an independent determination.[64] Contrast this with the Court's actions in

58. *Id.* at 57-59.

59. *Id.* at 59.

60. "Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected." *Id.* at 60.

61. *Id.* at 63. "With studied indifference to the interests of the mortgagee or to his appropriate protection [the legislature] has taken from the mortgage the quality of an acceptable investment for a rational investor." *Id.* at 60.

62. 291 U.S. 502 (1934).

63. 300 U.S. 379 (1937).

64. 295 U.S. at 60.

Blaisdell, in which the Court outlined and examined the great depression, and concluded that the situation created the need for the legislation.[65] The *Blaisdell* Court, while giving lip service to theories of deference, engaged in a judicial analysis of the need for the legislation.

Treigle v. Acme Homestead Association,[66] a 1936 decision, continued the evolutionary process of the legitimate ends-reasonable means test set out in *Blaisdell*. In *Treigle*, the state enacted legislation that modified the withdrawal procedures for shareholders of domestic building and loan associations. The modification was enacted after appellant, a shareholder, filed the statutorily required withdrawal notice. Under the new legislation, the appellant would have received less of his money immediately.[67] The shareholder sued the building and loan association, alleging that the statute violated the contract clause. The Court analyzed the challenged statute only under an ends-means analysis,[68] without mention of the five-factor analysis of *Blaisdell*. The Court continued using the more liberal view established by *Kavanaugh* as to legitimate ends, although it held that this legislation unconstitutionally violated the contract clause. The Court found there was no connection between the stated aim of the statute and its actual effect.[69]

Although the Court held that the statute was unconstitutional, its use of the ends-means analysis began to parallel even more closely the substantive due process analysis. The Court continued to hold a more liberal view as to the legitimacy of the legislative ends, but insisted upon a close relationship between the ends and the means.[70]

Veix v. Sixth Ward Building & Loan Association,[71] a case decided in 1940, like *Treigle*, illustrated that despite lip service to *Blaisdell's* theory, the Court had in fact abandoned the *Blaisdell* test. In *Veix*, the legislature passed a statute changing the withdrawal procedures for shareholders of building and loan associations. A shareholder challenged the change, contending that it violated the contract clause. The Court upheld the statute against this challenge, holding that such a change was within legislative power.[72]

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65. 290 U.S. at 422-23, 444.
66. 297 U.S. 189 (1936).
67. *Id.* at 191-95.
68. *Id.* at 197. A proper exercise of the police power must be "for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end." *Id.*
69. *Id.* at 197-98.
70. *See* note 123 *infra*.
71. 310 U.S. 32 (1940).
72. *Id.* at 39-41.

The Court used the ends-means analysis in determining the validity of the challenged statute. Although the legislation originated in the emergency situation presented by the depression, the legislation was of a permanent nature. This permanency, however, did not offend the Court. When examining the legislation, the Court noted its permanency and stated, "We are here considering a permanent piece of legislation. So far as the contract clause is concerned, is this significant? We think not."[73] Thus, while the Court may not have explicitly rejected the five-factor *Blaisdell* analysis, they overtly rejected the fifth factor requiring temporariness.

Significant is the loose application of the ends-means test. As in both *Treigle* and *Kavanaugh*, the *Veix* Court's contract clause analysis paralleled its substantive due process analysis. In keeping with the substantive due process ends-means test of *West Coast Hotel v. Parrish*[74] and its progeny, the Court deferred to the legislative judgment of the legitimacy of the ends and did not insist on a tight fit between the ends and the means. In fact, the Court did not examine with any depth the ends and the means. Rather, much of the opinion was merely a justification of the state's actions.[75]

The 1965 case of *City of El Paso v. Simmons*[76] was the last contract clause case decided by the Supreme Court before 1977. The legislation in *El Paso* changed a state law that allowed purchasers of state land who defaulted on payments to redeem the land at any time unless rights of third parties intervened. In 1941, the law was amended to limit reinstatement rights to five years from the forfeiture date. The land directly involved here was forfeited in 1947 (thus, the statute had *no* retroactive effect) and the appellee tried to restore his title more than five years after forfeiture. The appellee challenged the statute as unconstitutionally violating the contract clause. The Court upheld the statute, holding that it did *not* violate the contract clause.[77]

The purpose of the statute was to end land speculation. Under the former statute, forfeiting purchasers would let their titles remain dormant for years and then reinstate title if and when oil and gas were found on the land. The long shadow cast by perpetual possibility of

73. *Id.* at 39.

74. 300 U.S. 379 (1937). *See* note 123 *infra*.

75. The Court decided additional contract clause cases between 1940 and 1965. *See, e.g.*, East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945); Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942). The only case through 1977 holding state action unconstitutional as violating the contract clause was Wood v. Lovett, 313 U.S. 362 (1941).

76. 379 U.S. 497 (1965).

77. *Id.* at 516-17.

reinstatement gave rise to much litigation between forfeiting purchasers and the state. The legislation was designed to remedy this situation.[78]

The Court, in upholding the statute, continued to use a loose and liberal ends-means analysis. In examining the legitimacy of the ends, the Court paralleled the substantive due process policies of deference to legislative judgment. Once within the area of the state reserved power, the Court recognized that it "must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' "[79] Policies of deference, combined with the Court's acceptance of a loose fit between the ends and the means, are not equal to the *Blaisdell* test. In *El Paso*, the Court did not attempt to apply any part of the five-factor *Blaisdell* test. Rather, it used a more liberal application of the ends-means analysis.

The *El Paso* decision spurred speculation that the contract clause prohibitions, in their current application, had little practical effect in protecting property rights. Justice Black, dissenting in *El Paso*, expressed the belief that the clear guaranties of the contract clause had been balanced away.[80] Other commentators believed "the clause is of negligible importance, and might as well be stricken from the Constitution."[81] It was further voiced that "results [of litigation] might be the same if the contract clause were dropped out of the Constitution, and the challenged statutes all judged as reasonable or unreasonable deprivations of property" under the due process clause.[82]

D. United States Trust Co. v. New Jersey *Interpretation*

Contrary to the fears and beliefs of commentators,[83] the post-*Blaisdell* interpretation of the contract clause prohibitions did not dictate a permanent impotence for the clause. *United States Trust Co. v. New*

78. *Id.* at 512-13.

79. *Id.* at 508-09 (quoting East New York Sav. Bank v. Hahn, 326 U.S. 230, 232-33).

80. 379 U.S. at 517 (Black, J., dissenting) ("In this case I am compelled to dissent from the Court's balancing away the plain guarantee of Art. I, § 10 . . .").

81. H. CHASE & C. DUCAT, CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 105 (1974 ed.).

82. Hale, *supra* note 7, at 890-91.

83. Constitutional law textbook writers, too, have been very skeptical of the present importance of the contract clause and have treated it accordingly. *See* E. BARRETT, JR., CONSTITUTIONAL LAW CASES AND MATERIALS 571 (5th ed. 1977) ("In view of the relative lack of present importance of the contract clause, the coverage here will be limited."); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 604 (9th ed. 1975) ("Yet the contract clause deserves brief separate attention here.").

Jersey[84] indicates that the contract clause prohibitions are not without practical effect if the state is a party to the impaired contract.[85] *United States Trust* involved a statutory covenant between bondholders of the Port Authority of New York and New Jersey and the Port Authority itself. This covenant, providing the security provisions for the bonds, was repealed by the New Jersey and New York legislatures,[86] resulting in a total abrogation of this particular provision of the bonds. Bondholders challenged this repeal as an unconstitutional impairment of the obligation of contract. The Court agreed with the bondholders and found the statutory repeal to violate the contract clause.[87] Significantly, the Court used a *Blaisdell* analysis. In this respect, the *United States Trust* Court recognized that legislation can impair the obligations of contract and still be constitutional if that legislation satisfies the legitimate ends-reasonable means test.[88] Further, the Court continued to recognize that it is a legislative function to determine the "necessity and reasonableness of a particular measure."[89] However, the Court rejected the concept of deference to the legislative determination of necessity and reasonableness in instances in which the state is a party to the contract affected by the legislation: "When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis."[90] Thus, the Court resurrected the strict *Blaisdell* test in the limited context in which the state impairs a contract to which it is a party.

The strict *United States Trust* test is not absolute. A state may, under certain circumstances, be able to pass legislation that impairs contracts to which it is a party without violating the contract clause. An impair-

84. 431 U.S. 1 (1977). *United States Trust* is a 4-3 decision. Justice Stewart took no part in the decision and Justice Powell took no part in the consideration or decision of the case.

85. *Id.* at 32. *See also* McTamaney, *United States Trust Company of New York v. New Jersey: The Contract Clause in a Complex Society*, 46 FORDHAM L. REV. 1 (1977); Kayajanian, *United States Trust Co. v. New Jersey: The Resurrection of the Contract Clause*, 5 W. ST. L. REV. 189 (1978); Comment, *Revival of the Contract Clause*, 39 OHIO ST. L.J. 195 (1978).

86. 431 U.S. at 14. Although statutory repeal was passed by both New Jersey and New York, suit was filed only against New Jersey.

87. *Id.* at 32. The dissent questioned whether there was actually any impairment of contract. It is noted by the dissent that the statute imposes only inconsequential burdens and does not impair any practical or substantial rights. *Id.* at 34 (Brennan, J., dissenting). Because there was no actual showing of any financial loss by the bondholders, the dissent may well be correct. If there is no actual loss then no impairment should be found because the Constitution is "intended to preserve practical and substantial rights, not to maintain theories." Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 514 (1942) (quoting Davis v. Mills, 194 U.S. 451, 457 (1904)).

88. 431 U.S. at 22.

89. *Id.* at 23.

90. *Id.*

ment of a state's own contractual obligations "may be constitutional if [that impairment] is *reasonable and necessary* to serve an important public purpose."[91] The words "reasonable and necessary" are read differently and more strictly in the instances in which a state legislative act impairs its own contracts. "In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake. A governmental entity can always find a use for extra money."[92] Thus, the Court held that when a state modifies its own contract in its own self-interest, it is a function of the judiciary to determine if the modification satisfies the legitimate ends-reasonable means test. This is in contrast to the almost absolute deference to the legislative determination of need exhibited in *City of El Paso v. Simmons*, which also involved a state modification of a contract to which the state was a party.[93] The *United States Trust* Court's elaboration on their deference test illustrates the similarity of its test both to *Blaisdell* and the substantive due process analysis of that era.

The *United States Trust* test is this: When the state acts in its self-interest in modifying the contract, the "necessary and reasonable" test is given a strict application and is applied without deference to the legislature. In these circumstances, "reasonable" is interpreted to mean that the situation requiring the modification was unforeseeable.[94] "Necessary" is satisfied only if there are no less drastic alternatives that could implement the modification accomplished by the legislation.[95] This *Blaisdell*-type test has already had significant impact in contract clause challenges to state legislation that impairs state contracts.[96]

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91. *Id.* at 25 (emphasis added).

92. *Id.* at 25-26.

93. *See* notes 76-79 *supra* and accompanying text.

94. 431 U.S. at 31-32.

95. *Id.* at 29-31.

96. Fiscal problems are now prevalent in many municipalities and states. Whether these situations will lead to the impairment of contracts in state financial self-interest is unknown. If this does occur, however, the *United States Trust* analysis will have to be used to determine if these impairments are constitutional. For an excellent comment dealing with New York City's fiscal crisis, written before the *United States Trust* decision, see Comment, *The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause*, 125 U. PA. L. REV. 167 (1976).

Further effect of the *United States Trust* case could extend to situations such as those presented by a recent (June 1978) California initiative (commonly known as the Jarvis-Gann initiative), which limits the assessment and taxing powers of state and local governments. CAL. CONST. Art. XIIIA. If this initiative, by limiting state and local revenue, were to cause the impairment of contract, the impairment would have to satisfy the *United States Trust* analysis to be constitutional. For example, in Sonoma County Org. of Pub. Employees v. County of Sonoma, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979), the Califor-

Significantly, *United States Trust*, by resurrecting the *Blaisdell* test in a limited context, has become a harbinger for *Blaisdell*'s across-the-board resurrection. This resurrection became a fact in 1978, in the case of *Allied Structural Steel Co. v. Spannaus*,[97] when the Court specifically incorporated the *Blaisdell* factor analysis into its decision-making process. Through *Allied* the strict *Blaisdell* test, with its refusal to defer to the legislative judgment of need, became a fact for contract clause litigation, while remaining a piece of history for litigation involving other economic concerns not protected by the contract clause. As will be shown, the Court continues in the traditional approach when the due process clause is involved.

II. *ALLIED STRUCTURAL STEEL*: THE OPINION

Allied Structural Steel (the company) brought an action challenging the constitutionality of the Minnesota Private Pension Benefits Protection Act (Pension Act) on the grounds that it violated the contract clause.[98] Although the company's principal place of business was in Illinois, it maintained an office in Minnesota with thirty employees. In 1963 the company voluntarily adopted a pension plan, over which it retained a complete right to terminate or modify. The company's control over the plan was complete except for those contributions already made or rights already vested.[99] Only the company contributed to the plan, and those contributions were made yearly, based on actuarial predictions.

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nia Supreme Court held that a state statute, which distributed bail-out funds to municipalities on the condition that pay hikes and cost of living increases were not granted, was unconstitutional as violating the contract clause of the Constitution. The Court noted that *United States Trust* is the "most useful [decision] in resolving the problem at hand." *Id.* at 307, 591 P.2d at 6, 152 Cal. Rptr. at 908. Given the trend toward adopting this type of tax restrictive legislation, it seems inevitable that more of these contract clause issues will arise. When they do, the standards from *United States Trust* will control.

97. 438 U.S. 234 (1978).

98. *Id.* at 239-40. At the district court level the statute was challenged as violating the due process, equal protection, and commerce clauses of the Constitution, as well as the contract clause. Fleck v. Spannaus, 449 F. Supp. 644 (D. Minn. 1977). Only the contract clause challenge was considered at the Supreme Court level.

99. Rights would vest under this pension plan if an employee aged 65 or more retired without satisfying any length of service requirement (size of pension would reflect length of service with the company). An employee could also receive a pension, payable at 65, if he met one of the following requirements: (1) he had worked 15 years for the company and reached the age of 60; (2) he was at least 55 years old and the sum of his age and his years of service with the company was at least 75; or (3) he was under 55 but the sum of his age and years of service with the company was at least 80. Once rights vested under the pension plan, a termination of employment would not affect right to payment. 438 U.S. at 236-38.

In 1974 Minnesota enacted the Pension Act,[100] which provided that an employer with over 100 employees, at least one of whom worked in Minnesota, who provided a pension plan satisfying section 401 of the Internal Revenue Code,[101] was subject to the Act. It provided that if such an employer ceased doing business altogether or closed its Minnesota office, that employer would be subject to a pension fund charge. This charge was assessed if the assets in the company's plan were not sufficient to provide full pensions for employees who had worked ten years or more.[102]

After the passage of the Pension Act, the company began closing its Minnesota office. Because the company employed over 100 people and met the other criteria of the Act, Minnesota imposed a pension funding charge. Minnesota notified the company that it owed approximately $185,000 under the terms of the Act.[103] Allied Structural Steel then brought suit in federal district court[104] challenging the constitutionality of the Act and seeking both declaratory and injunctive relief. The company alleged that the Pension Act unconstitutionally impaired the contract between itself and its employees. The district court held the Act valid,[105] relying almost exclusively on *United States Trust*[106] to reach its decision. The court noted that because the state was *not* a party to the impaired contract, great deference had to be given to the legislative judgment that the impairment was reasonable and necessary to accomplish legitimate policy aims.[107] With such great deference to the legislative judgment, the district court could find no basis on which to hold the Act unconstitutional. The company appealed the district court decision, eventually to the Supreme Court. The Supreme Court reversed and held that the Minnesota Pension Act unconstitutionally impaired the obligation of contract.[108]

In reversing, the Court noted that the Pension Act had a severe and substantial impact on the contractual relationship beteeen the company and its employees. The Court held that by superimposing pension obligations beyond those the company had voluntarily agreed to under-

100. Minn. Stat. §§ 181B.01-181B.17.

101. The company's pension plan qualified under I.R.C. § 401 (1976). 438 U.S. at 236.

102. *Id.* at 238.

103. *Id.* at 239.

104. Fleck v. Spannaus, 449 F. Supp. 644 (D. Minn. 1977) (mem.). *See also* Fleck v. Spannaus, 421 F. Supp. 20 (D. Minn. 1976) (challenging the enforceability of the Pension Act).

105. 449 F. Supp. at 654.

106. 431 U.S. 1 (1977).

107. 449 F. Supp. at 649-51.

108. 438 U.S. at 250-51.

take, the Pension Act substantially altered the company's contractual expectations. The mere alteration of contract, however, did not necessitate finding the statute unconstitutional. The contract clause is not an absolute prohibition on the impairment of contract obligations.[109] Clause prohibitions must be construed in harmony with the reserved power of the states, particularly exercises of the police power. The Court recognized the existence and viability of both the contract clause and the state police power and the conflict they presented in *Allied*, and proceeded to determine which prevailed under these facts.

The Court, in an opinion written by Justice Stewart, began their analysis by noting that the severity of the impairment determines the strictness of the inquiry into the nature and purpose of state legislation. In other words, the greater the impairment, the less deference to the legislative judgment. The Court proceeded to find that the Pension Act severely impaired the company's contract by retroactively increasing the company's obligation to make pension plan contributions. Noting that with pension plans the occurrence of major unforeseen contingencies can affect a company's solvency,[110] the Court found that this Pension Act severely disrupted the company's contractual expectations. Because of the severeity of the contractual disruption and the legislative failure to demonstrate the need for this disruption, the Court held that "[t]he presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure' . . . simply cannot stand in this case."[111]

In holding the Pension Act unconstitutional, the Court retreated from the post-*Blaisdell* broad reading of what is in the public interest and readopted the strict *Blaisdell* test of public interest. In doing so, the Court considered three of the five *Blaisdell* factors[112] and analyzed the challenged legislation in relation to them.[113] The *Allied* Court added an additional factor from *Veix*,[114] not present in *Blaisdell*. By se-

109. Id. at 241-42. *See also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), City of El Paso v. Simmons, 379 U.S. 497 (1965).

110. 438 U.S. at 247. The majority cites to Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 721 (1978), to support the proposition that unforeseen contingencies in pension plans can affect solvency. An excellent article on the effect of unforeseen termination of pension plans, the evil the Minnesota Legislature was attempting to eliminate, is Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 HARV. L. REV. 952 (1963).

111. 438 U.S. at 247 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977)).

112. *See* notes 37-47 *supra* and accompanying text.

113. *See* notes 143-45 *infra* and accompanying text.

114. *See* text accompanying notes 71-74 *supra*.

lecting four factors that had to be satisfied before the impairment could be held constitutional, the *Allied* Court set up a strict, and in this case, insurmountable test. Therefore, the finding of unconstitutionality was inevitable.[115]

III. *ALLIED STRUCTURAL STEEL*: DEVIATIONS AND IMPACT

Allied deviates from modern contract clause theory and analysis in three major areas. First, the *Allied* Court strictly applies the ends-means analysis by accepting only a narrow area of permissible ends, in contrast to recent precedent;[116] second, the Court refuses to maintain the presumption favoring the legislative judgment as to the necessity and reasonableness of the legislation;[117] and, third, the Court expands the concept of what the term contract encompasses for purposes of analyzing contract impairment.[118] The impact of these deviations will be significant. The Court's analysis completes the resurrection of *Blaisdell* started by *United States Trust* and implicitly overrules the modern contract clause interpretation that evolved after the *Blaisdell* case.

A. Strict Application of Ends-Means Analysis—Narrow Scope for Permissible Ends

Since the 1890's, the Court has consistently applied both an ends-means test[119] and a test of permissible ends to challenged legislation under both the due process and contract clauses.[120] Since that time, the formulation of the test has remained the same, but its application has varied. The Court has consistently held that the end (purpose) of legislation must be within a legitimate area of governmental concern. The differences in application have resulted from the Court's view of what constitutes a legitimate end and the degree of deference the Court affords to the legislative determination of whether an end is permissible.[121] The ends-means analysis is closely related to the permissible

115. "But we do hold that if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case." 438 U.S. at 250-51.

116. *Id.* at 248-49. *See* text accompanying notes 119-67 *infra*.

117. 438 U.S. at 247-48. *See* text accompanying notes 168-86 *infra*.

118. 438 U.S. at 244-47 & n.16. *See* text accompanying notes 187-222 *infra*.

119. *See* text accompanying note 36 *supra*.

120. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 436-42 (1978).

121. *Compare* Adkins v. Children's Hosp., 261 U.S. 525 (1923) *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). In *Adkins*, the Supreme Court held that a minimum wage law assigned to protect women laborers was unconstitutional because the end of the legislation fell outside of the permissible range of legislative control. 261 U.S. at 554. In *West Coast Hotel*, however, similar legislation was upheld on the rationale that the protection of

ends analysis. The ends-means analysis requires not only that the legislation be aimed at a permissible end of government, but also that the means used to meet that end be reasonable. The application of this test has varied.[122] At times the Court has insisted on a close relation between the ends and the means, while at other times, the Court has deferred to the legislative judgment of what is a reasonable means to achieve the ends.

During the substantive due process era[123] of 1880–1935 the Court insisted on a close relation between the ends and the means of the legislation, and strictly construed the legitimate ends of government.[124] An example of the Court's analysis during that period is *Lochner v. New*

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women is a legitimate legislative end. 300 U.S. at 398. These disparate conclusions are primarily the result of a shift in the Court's perception of what constitutes a legitimate legislative end.

122. *Compare* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) *with* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

123. Substantive due process was a theory utilized by the Court, between Lochner v. New York, 198 U.S. 45 (1905), and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), to void any economic or social legislation that the court believed unreasonably infringed on the liberty to contract. The substantive due process test required that the government use means, the legislation, that bore some reasonable relation to a legitimate end. While the test is substantially the same today, during the substantive due process era, the Justices voided any law that did not satisfy their personal belief as to what was necessary. Thus, independent judicial review of legislation made the constitutionality of the legislation depend on the personal views of individual Justices. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (regulation of bakers' hours held to violate due process); Hammer v. Dagenhart, 247 U.S. 251 (1918) (child labor law held unconstitutional); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (minimum wage law held unconstitutional).

It seems that the only way social or economic legislation could be validated during this period was to present the court with a "Brandeis Brief," a brief containing massive documentation to justify the legislation. *See* Muller v. Oregon, 208 U.S. 412, 419 n.1 (1908).

The substantive due process doctrine died in the 1930's, and was replaced with the doctrine that called for the Court to defer to the legislative judgment as to the necessity and reasonableness of the legislation. *See, e.g.*, Olsen v. Nebraska, 313 U.S. 236, 246 (1941) ("We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the states and to Congress.' ") (citations omitted); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."). *See generally* Strong, *The Economic Philosophy of* Lochner: *Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

The rationales that led to deferring to the legislative judgment in the substantive due process area also led to a policy of deference when the contract clause was involved. *See, e.g.*, East New York Sav. Bank v. Hahn, 326 U.S. 230, 233 (1945) ("[W]e must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' ") (citations omitted).

124. *See generally* Strong, *The Economic Philosophy of* Lochner: *Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973).

York.[125] The legislation challenged in *Lochner* prohibited bakers from working more than sixty hours a week. The Court held that the statute violated the due process clause of the fourteenth amendment. The Court found that the statute was not designed to achieve a permissible end of government, in that it infringed on the liberty to contract encompassed in the due process clause. Further, the Court held that there was no connection between the end sought—clean and healthful bread—and the means used to achieve those ends—limiting baker's hours.[126]

In *West Coast Hotel v. Parrish*,[127] the Court rejected the substantive due process analysis of *Lochner*, which required a close fit between the ends and the means and close scrutiny of the ends of the legislation. During the period between *West Coast Hotel* and *Allied*, in both the contract and due process clause analyses, the Court deferred to the legislative determination of the legitimacy of the ends, and utilized a loose ends-means analysis. This application of the test has resulted in the Court upholding legislation that would have been declared invalid during the substantive due process era.[128]

The above discussion directly relates to the *Allied* Court's analysis. *Allied*, therefore, represents a readoption of the strict tests used during the substantive due process era. This return to the substantive due process tests is manifested in two ways: (1) the Court strictly limits the permissible range of legislative ends when the legislation impairs contracts; and (2) the Court requires a very close fit between the ends of the legislation and the means used to achieve those ends.

1. Strictly limiting the permissible ends of legislation

Allied implicitly limited the permissible ends of legislation by requiring that the challenged legislation "deal with a broad, generalized economic or social problem."[129] It is, of course, the Court that will decide whether the end of the legislation satisfies the broad societal interest criterion. The Court recognized that contracts are subject to the valid exercise of police power, but proceeded to state that the contract clause does "impose *some* limits upon the power of a State to abridge existing contractual relationships."[130] The requirement that the legislation deal

125. 198 U.S. 45 (1905).
126. *Id.* at 56-57.
127. 300 U.S. 379 (1937).
128. *See* note 121 *supra*.
129. 438 U.S. 250.
130. *Id.* at 242 (emphasis in original).

with a broad societal interest therefore limits a state's police power to interfere with contractual relations.

The Court began its analysis by suggesting that the Minnesota Pension Act was invalid because the Act did not address all aspects of the problem.[131] This suggested invalidity results from the Pension Act's failure to protect a broad societal interest. However, the Court's analysis of this factor contains two misconceptions. First, it is well established that a state, in acting for the general welfare, need not address the entire problem. In rectifying a problem "the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt."[132] The Minnesota legislature, in adopting the Pension Act, was simply alleviating the problem where it was most felt. There are indications[133] that the Minnesota legislature was aware that at least one[134] corporation with employees in Minnesota was contemplating terminating its Minnesota employees and closing its operation within the state. The state, aware of this potential termination of operations, enacted the Pension Act to ensure that employees similarly situated would receive their expected pension benefits.[135] Thus, it is clear that the legislature initially perceived the problem in a certain area and sought to rectify it there first.

The second misconception in the Court's analysis is its interpretation of the "broad societal interest" requirement, a concept derived from *Blaisdell*.[136] The *Allied* Court stated that when an exercise of a state's police power impairs the obligation of a contract, such exercise should "protect a broad societal interest rather than a narrow class."[137] In using this language, the *Allied* Court interpreted the societal interest fac-

131. *Id.* at 250. The statute's "narrow aim was levelled not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees." *Id.*

132. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 519-20 (1937). The majority opinion in *Allied* recognizes that the legislature first felt this problem when an employer in the state terminated some of its operations within the state. 438 U.S. at 247-48 (quoting Fleck v. Spannaus, 449 F. Supp. 644, 651 (D. Minn. 1977) (mem.)).

133. Fleck v. Spannaus, 449 F. Supp. 644, 651 (D. Minn. 1977) (mem.) ("It seems clear that the problem of plant closure and pension plan termination was brought to the attention of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota Plants and attempted to terminate its pension plan.").

134. *Id.* For the results of the litigation as to the applicability of the Pension Act to White Motor Corporation, see Malone v. White Motor Corp., 435 U.S. 497 (1978).

135. 449 F. Supp. at 651. "There is absolutely no evidence from the legislative history or debates on the Pension Act to support Allied's claim that the Act was aimed solely at White Motor Corporation." *Id.*

136. 290 U.S. 398, 445 (1934).

137. 438 U.S. at 249.

tor to require that a large percentage of society must be directly benefited by the legislation. Thus, the *Allied* Court interpreted this factor to require that a specific number of individuals be benefited. But what *Blaisdell* actually required was that the legislation be "not for the mere advantage of particular individuals but for the protection of a basic interest of society."[138] There is more than a semantic difference between the *Allied* and the *Blaisdell* analyses of the societal interest factor. *Blaisdell* was not concerned with the numbers directly benefited by the challenged legislation. Rather, the test in *Blaisdell* was whether the statute was designed to benefit the general welfare. That not all of society was benefited directly by the statute attacked in *Blaisdell* is apparent from its scope; it afforded protection only to individuals who owned real property that was subject to foreclosure.[139] But the statute was interpreted as effecting a broad societal benefit by allowing individuals to retain their real property, even though not all of society was directly aided.

The statute held unconstitutional in *Allied* could be construed to benefit a broad societal interest, even though the direct benefits of the statute accrued to only a narrow class.[140] Pension plans provide economic benefits to those who reach a certain age. The societal interest in aiding the financial stability of the elderly is undeniable. Financial stability enables the elderly to spend money, thus economically benefiting the surrounding community. Further, if the elderly are provided for in pension plans, neither public nor private welfare agencies will have the burden of ensuring the economic well-being of these individuals. Thus, while the statute might numerically provide for only a "narrow class," it does satisfy the *Blaisdell* requirement of protecting a basic societal interest, rather than particular individuals. *Allied's* insistence that a statute benefit a certain number of people before it can be held to be a legitimate exercise of the police power, distorts the *Blaisdell* requirement, and makes it extremely difficult for a statute to satisfy the *Allied* societal interest criterion. Legislation is often enacted for the immediate benefit of a narrow class, with the ultimate benefits trickling down to the broad base of society. By adopting this narrow view of legitimate police power exercises, the Court is subjecting much of this legislation to eventual contract clause challenges.

Further, the Court's insistence that a broad societal interest be served by the legislation is a reversion to the theories predominate in *Loch-*

138. 290 U.S. at 445.
139. *Id.* at 416-20.
140. *See* Fleck v. Spannaus, 449 F. Supp. 644, 649-50 & n.6 (D. Minn. 1977) (mem.).

ner[141] and to the substantive due process era limitation on legitimate ends. In that era the Court insisted that legislation directly benefit the public as a whole. The Court rejected this notion in *West Coast Hotel*, when it realized that laws helping certain narrow groups help the public as a whole as well.[142]

2. Strict application of ends-means analysis

In addition to resurrecting the *Lochner* restriction on legitimate ends, *Allied* resurrected the *Lochner* strict scrutiny of the ends-means analysis, which requires a close fit between the ends and the means. In analyzing the relation between the ends and the means, the *Allied* Court adopted factors from earlier contract clause cases. Three factors, developed in earlier cases, were used to examine the reasonableness of the means used to implement the legislative purpose: (1) whether the legislation deals with an emergency situation, as in *Blaisdell*;[143] (2) whether the legislation is temporary in operation, as in *Blaisdell*;[144] and (3) whether the legislation operates in an area already subject to regulation, as in *Veix*.[145] While these factors were important and, perhaps even determinative, in the cases from which they originate, the Court has never before suggested that any or all of these factors must be satisfied to justify the exercise of the state reserved powers. *Allied*, however, imposed upon the state the duty of satisfying these factors before the statute could be found to be a justified exercise of state reserved power. The Court subjected the Pension Act to a rigorous analysis in order to determine if the Act fulfilled each of these factors.[146] In conducting this analysis and applying these extracted factors, the Court distorted their meaning.

The *Allied* Court found the Pension Act lacking because the legislation was not enacted to deal with an emergency situation.[147] While recognizing that it may not require "an emergency of great magnitude constitutionally [to] justify a state law impairing the obligations of contracts,"[148] the Court did intimate that since no emergency situation jus-

141. 198 U.S. 45 (1905).
142. 300 U.S. 379, 385 (1937).
143. 290 U.S. at 444-45.
144. *Id.* at 447.
145. 310 U.S. at 38.
146. 438 U.S. 248-50. Whereas the Court tested the Pension Act by these factors, it recognized that not all of them had been required in past cases that sustained contract clause challenges. *Id.* at 249 n.24.
147. *Id.* at 249.
148. *Id.* at 249 n.24.

tified this statute, it did not have a permissible end and was therefore unconstitutional. However, *Veix*[149] expressly holds that an emergency situation need not exist for a statute to constitutionally impair the obligation of the contract.[150] For an exercise of the state power to act in the general welfare to impair contractual obligations validly, there need exist only a problem that is within the area of legislative competency.[151]

The Court further criticized the Pension Act because the Act provides relief that is permanent,[152] rather than the temporary relief afforded by the *Blaisdell* statute. However, statutes that have been held constitutional when subject to a contract clause challenge have often provided relief that is permanent.[153] A statute enacted to deal with a situation that could not be characterized as an "emergency," may need to provide permanent relief to be effective. Thus, by requiring relief to be temporary, the Court is implicitly requiring an emergency, and vice versa. Neither of these requirements finds support, however, in past precedent. Rather, the Court in the past has validated statutes involving permanent relief in a non-emergency situation, even though they impaired contract obligations.[154]

Further, the Pension Act can be viewed as providing only temporary relief. The Act, by its terms was to remain in effect only until the federal Employee Retirement Income Security Act (ERISA) was effective. ERISA was to preempt all state laws, and the Minnesota legislature indicated an awareness of ERISA's preemptive effect in the Pension Act.[155] Thus, as the Court recognized, the Pension Act was in effect for less than nine months. The Court, then, condemned the Pension Act for not being temporary, while recognizing in a footnote that the Act's effective life was less than nine months.[156]

Finally, the Court condemned the Pension Act because it did not operate in an area already subject to regulation.[157] This requirement

149. 310 U.S. at 38-39. "If the legislature could enact the legislation . . . in that emergency, we see no reason why the new status should not continue." *Id.* at 39.

150. There are other cases in which legislation has been held valid despite its interference with contracts and the situation in which they operated could not be characterized as "emergency." *See, e.g.*, East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945); City of El Paso v. Simmons, 379 U.S. 479 (1965).

151. 379 U.S. 479.

152. 438 U.S. at 250.

153. *See, e.g.*, Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940); City of El Paso v. Simmons, 379 U.S. 479 (1965).

154. *See* note 153 *supra*.

155. 438 U.S. at 248-49 n.21.

156. *Id.* ("[T]he Minnesota Act was in effect less than nine months").

157. 438 U.S. at 250.

was derived from *Veix*,[158] in which a statute altered the withdrawal procedures for building and loan associations. While the fact that the area in which the statute operated may have been significant in *Veix*, it has never before been suggested that legislation, to impair a contractual obligation justifiably, must operate in an area already subject to regulation.[159]

The selective extraction and subsequent misapplication of factors relevant in previous cases by the Court in *Allied*, operated as a misapplication of past precedent. There is no indication that any of the extracted factors was meant to be determinative, or even necessarily significant in cases following *Blaisdell*. In actuality, each of these extracted factors was absent in at least one case in which a statute was upheld against a contract clause challenge. Never in the post-*Blaisdell* era were contract clause questions measured by such precise criteria, satisfaction of each being a prerequisite for constitutionality. Prior to *Allied*, challenged legislation was required to satisfy the legitimate ends-reasonable means test and was considered in the totality of the circumstances[160] rather than merely being required to satisfy specific criteria.

These factors illustrate the *Allied* Court's reversion to the strict scrutiny test of the *Lochner* era. By applying this level of scrutiny in a selected area—contracts impaired by state legislation—the Court has singled out a particular type of interest, contract, and afforded it higher protection than other interests. For example, the Court consistently recognized the government's rights to interfere with property under police power, when a contract clause issue is not involved. In a case decided the same term as *Allied Structural Steel, Penn Central Transportation Co. v. New York*,[161] the Court upheld against a fourteenth amendment due process challenge a city ordinance that restricted the use of property, thereby lessening the value of appellant's property. The *Penn Central* Court upheld this ordinance under both a loose ends-means analysis, and a broad view of permissible ends.[162] A

158. 310 U.S. 32, 38 (1940).

159. The Court has never before suggested that this is a significant factor. However, the Court has overlooked the fact that labor relations, and employement contracts, are subject to massive regulation. *See generally* LABOR RELATIONS AND SOCIAL PROBLEMS (2d ed. R. Covington 1974).

160. *See, e.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977); City of El Paso v. Simmons, 379 U.S. 479 (1965).

161. 438 U.S. 104 (1978).

162. *Id.* at 136-38.

similar example is *Usery v. Turner Elkhorn Mining*.[163] In *Turner Elkhorn Mining* the Court upheld against a fifth amendment due process challenge a federal statute that retroactively affected the obligations of mine owners to compensate former and present miners who contract pneumoconiosis (black lung disease). The statute required employers to pay compensation to these workers, although no such compensation was required by the employee-employer contract.[164] Despite the drastic increase in financial liability and the retroactive and permanent effect of this legislation, it was held valid.[165]

The real difference between *Penn Central* and *Turner Elkhorn Mining* on the one hand, and *Allied* on the other is the way the Court applied the ends-means and legitimate ends test. In the first two cases the Court was able to uphold the legislation, because it was willing to defer to the legislative determination of what was in the public interest and necessary and therefore a permissible end.[166] In *Allied*, however, the legislation was declared invalid because of the strictness in applying the tests. This results in an elevation of a particular interest, that protected by contract, to a higher standard of protection than is afforded to non-contractual interests. There is simply no rational basis for this distinction. Following the *Allied* theories, an identical statute could be passed by both a state and the Congress, and the congressional statute upheld because the contract clause only applies to states,[167] while the state statute is invalidated. Further, the mere finding of the existence of a contract could affect the entire outcome of legislation.

B. Refusal To Maintain the Presumption Favoring the Legislative Judgment as to Necessary and Reasonableness of Legislation

Although the *Allied* Court implicitly acknowledged the existence of a presumption favoring the legislative judgment as to the need for legislation and the reasonableness of the scheme adopted, the Court, for reasons unexpressed, refused to maintain this presumption.[168] In doing so, under the *Allied* facts, the Court initially noted that the Minnesota

163. 428 U.S. 1 (1976).

164. *Id.* at 7-12.

165. *Id.* at 38.

166. Penn Central Transp. Co. v. New York, 438 U.S. 104 (1978); Usery v. Turner Elkhorn Mining, 428 U.S. 1, 18-19 (1976).

167. "No state shall . . . ." U.S. CONST. art. I, § 10.

168. Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. The presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure," . . . simply cannot stand in this case.

438 U.S. at 247 (citations omitted).

Pension Act severely disrupted the contractual relationship between the company and its employees. Because the state did not demonstrate any need for the Pension Act, the Court determined that the presumption favoring the legislative judgment could not stand.[169] Thus, the Court implied that the legislature has a duty to make some showing of the need for the legislation before the presumption in its favor will be maintained. In effect, therefore, there is no presumption, because the burden is on the state, not on the party challenging the legislation.

This is, however, contrary to the current jurisprudential theories of economic legislation. Since the 1930's, the challenger of the legislation has had the burden of demonstrating that the legislation is unnecessary or arbitrary.[170] The legislature has not been required to show the need for the enactment. Rather, "the existence of facts supporting the legislative judgment [was] to be presumed."[171]

Standard procedure since *Blaisdell* has been to defer to legislative judgment[172] whether the challenge is under the due process or contract clauses. Deference, a theory deriving from separation of powers and concepts of federalism, has left as a legislative function the determination of which laws are needed, because the legislature is the body with the duty of enacting legislation. "[The Court] does not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[173] Although precedent establishes deference as the accepted practice, for unarticulated reasons the *Allied* Court failed to follow these precedents. If *Allied* indicates an intent by the Court to continue to refuse to maintain the presumption favoring legislative judgment, an arbitrary situation could result. For example, the Court would have to adjudicate

169. *Id.* at 247-48. The Court notes that the only indication of legislative intent is found in the district court opinion.

170. "Once we are in this domain of the reserve power of a state we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary'." East New York Sav. Bank v. Hahn, 326 U.S. 230, 233 (1945) (citations omitted). The practice of giving deference to the legislature, and putting the burden on the challenger of the legislation, is also illustrated in due process cases. *See, e.g.*, Olsen v. Nebraska, 313 U.S. 236, 246 (1941) ("There is no necessity for the state to demonstrate before us that evils persist."); Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) ("We conclude that the [state] Legislature was free to decide for itself that legislation was needed to deal with the [problem].").

171. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

172. *See, e.g.*, City of El Paso v. Simmons, 379 U.S. 497, 508-09 (1965); East New York Sav. Bank v. Hahn, 326 U.S. 230, 232-33 (1945); United States Trust Co. v. New York, 431 U.S. 1, 22-23 (1977).

173. Griswold v. Connecticut, 381 U.S. 479, 482 (1965). *See also* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) ("The . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws. . . .").

questions involving economic legislation by different standards, depending upon which constitutional clause the litigant relied. If a due process violation were alleged, it would be the burden of the one challenging the legislation to come forward and demonstrate why the statute is not a legitimate exercise of the legislature's power.[174] If, however, the contract clause was invoked, the state would have the burden of demonstrating the legitimacy of the legislation, that it was both necessary and reasonable. The result is greater protection for property rights grounded in contract than for other property rights.[175]

Thus, if it is the intent of the Court to continue to refuse to maintain the presumption favoring the legislative judgment, either property grounded in contract would become a favored form of property when positioned in a way that is subject to the contract clause, or, in an attempt to be even handed, the Court could refuse to defer to the legislative judgment in all actions involving economic legislation. The latter possibility, with the Court refusing to entertain legislative presumption in any attack on economic legislation, would in reality be a return to the principles and theories of the substantive due process era.[176] Hopefully, the problems caused by the theories used by the Court during the substantive due process era[177] are fresh enough in the Court's memory that the presumption favoring the legislative judgment will not be discarded in all economic legislation litigation. Recent authority indicates that the Court will retain the practice of deference, at least when the contract clause is not involved.[178]

A comparison of *Usery v. Turner Elkhorn Mining Co.*[179] and *Allied*

174. Both state and federal legislation can be challenged on due process grounds, using the fourteenth amendment if it is state legislation, the fifth if it is federal. Due process theories now demand that the challenger of the legislation come forward and demonstrate that the statute is arbitrary or capricious. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963).

175. Compare the treatment of property in *Allied*, in which a contract was involved, with Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), and Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), neither of which involved contractual property. In both of the latter cases, the presumption favoring the legislative judgment was upheld, and the statute was found not to unconstitutionally deprive the challenger of property.

176. Substantive due process allowed the court to examine the substance of the legislation, and use their independent judgment to determine if the legislation was reasonable. *See* note 123 *supra*.

177. The decisions of the court during the latter part of the substantive due process era resulted in the invalidation of much of the "New Deal" legislation, and eventually led President Roosevelt to introduce his "court-packing" plan. *See* Strong, *The Economic Philosophy of* Lochner: *Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419, 449-54 (1973).

178. *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

179. *Id.*

indicates the favored position that the *Allied* decision gives to property based on contract when a state statute impairs the contract. The statute challenged in *Turner Elkhorn* severely altered the obligations mine owners had to employees. The old obligation was based on contract, but the contract clause could not be invoked to give the mine owners protection because the statute was federal and the contract clause only prohibits state action. In *Turner Elkhorn*, decided in 1976, a Court with the same composition as the *Allied* Court retained the presumption favoring the legislative judgment against a substantive due process challenge to the federal statute. In upholding the presumption favoring the legislative judgment, the *Turner Elkhorn Mining* Court noted:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature acted in an arbitrary and irrational way.[180]

The *Allied* Court, without even a modicum of logic evidenced, has elevated property rights with contractual origins to a more protected status than other property rights. An independent examination has indicated no basis for the higher protection of these rights. The only viable explanation for giving property that derives from contract greater protection than other property is the explicit and absolute nature of the contract clause. The contract clause provides that "no state shall,"[181] absolutely prohibiting action, whereas the due process clause only prohibits action that is not accompanied with due process. This analysis breaks down, however, with the realization that the contract clause was never considered absolute, and always thought to be subject to the police power.[182]

Further, there does not appear to be any logic in a position that would justify treating property differently based on its derivation,

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180. *Id.*

181. The contract clause explicitly provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. Art. I § 10, cl. 1. Other clauses relied on for the protection of individual property are not as explicit. An example is the due process clause, which is the major clause relied on for the protection of property. The due process clause of the fifth amendment provides that "[n]o person shall . . . be deprived of . . . property, without due process of law." U.S. CONST. amend. V. In the fourteenth amendment the due process clause provides that "[n]o state shall . . . deprive any person of . . . property, without due process of law." U.S. CONST. amend. XIV. The more explicit nature of the contract clause and the lack of any qualifiers such as "due process of law" in the clause, can allow for it to be construed as providing greater protection for property than other constitutional protections.

182. *See, e.g.*, Stone v. Mississippi, 101 U.S. 814 (1880) (state can exercise its police powers regardless of contract).

rather than its substance. If this different treatment continued, it would be due to the happenstance that the Framers inserted the contract clause to guard against a particular practice that existed under the Articles of Confederation,[183] rather than on a recognition that some property interests are more fundamental than others and thus require greater protection.

A different treatment of property interests based solely on the form which they take raises equal protection questions. For example, if State *X* enacted a minimum wage law, this would be clearly proper under the due process clause. However, under the new contract clause test the minimum wage law might be unconstitutional as applied to some employees. If one employer had workers under contract for less than the minimum wage, the minimum wage law would have to undergo strict scrutiny as applied to those employees. However, for non-contract workers, the minimum wage law would only have to undergo minimal scrutiny. The employer with the contract would be more likely to avoid the minimum wage law, thus raising equal protection questions. Thus, an employer could "contract" into immunity from state police power legislation. Therefore, under the *Allied* theory, similarly situated individuals will be treated differently, because of the mere fortuity of a contract.

The *Allied* Court's refusal to defer to the legislative judgment does not appear to be confined to the facts of that case. The only indication that *Allied's* strict scrutiny analysis might be confined to that case is that the Court indicated that *Allied* involved a severe impairment of contract with *no* legislative showing of need.[184] Thus, one might hope that the Court would only refuse to engage in the traditional deference if a severe impairment was combined with no legislative justifications. This, however, is probably no more than a hope. The *Allied* Court readily abandoned the deference tradition, which in the past required no legislative justifications, and required the legislature to come forward with justifications. There is no indication that the legislature would not have the same burden if the finding of impairment was less than severe. Further, the Court has, by using the words "severe disruption of contractual expectations"[185] adopted a vague standard into law, one which is so amorphous that it allows the Court to determine independently, without standards, what is severe. Barring some further

183. *See* notes 7-10 *supra* and accompanying text.

184. 438 U.S. at 249. "This legislation . . . [imposed] a sudden, totally unanticipated, and substantial retroactive obligation upon the company . . . ." *Id.*

185. *Id.* at 247.

elaboration on the *Allied* standard, one would have to conclude that this refusal to defer has become an integral part of contract clause litigation.

C. *Court Expands the Concept of What Is Included in a Contract, for the Purpose of Analyzing a Contract Impairment*

Allied, together with *United States Trust*, formally changes the nature of the inquiry aimed at determining if there has, in fact, been an impairment of contract.[186] Traditionally the question asked was whether there had been either a modification or abrogation of the obligations of the contract or a severe disruption of the remedy that, by making the enforcement of the obligation unduly difficult, rendered the obligation worthless.[187] *United States Trust* indicated that the aim of this inquiry was misplaced.[188] The recognition that obligations as well as remedies can be modified without violating the contract clause has made the traditional inquiry "largely an outdated formalism."[189] *Allied* and *United States Trust*, changed the nature of the initial inquiry, directing that inquiry to the question of what the legitimate expectations of the contracting parties were. By concentrating on the vague notion of contractual expectations the Court has created a means to expand the application of the contract clause. The Court has interpreted this legitimate expectations test to mean two different things. *Allied* is a vehicle for an expansive application of the contract clause, whereas in *United States Trust* the Court follows a more traditional contract clause approach.

The statute challenged in *Allied* does not dilute or abrogate any obligation owed by one party to another under a private contract.[190] What

186. The first inqiury in any case arising under the contract clause is whether a contract is actually involved. The inquiry then proceeds to determine whether the challenged statute operates in a way that impairs the obligation of the contract. *See, e.g.*, Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 194-95 (1936). Only after an impairment is isolated does the Court proceed to determine if that impairment is constitutional. City of El Paso v. Simmons, 379 U.S. 497 (1965).

187. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 430-31 (1934).

188. 431 U.S. at 19-21 n.17 & 26-27 n.25.

189. *Id.* at 19-21 n.17.

190. It is questionable whether *Allied* even presented a contract clause issue. To come under the contract clause there must be a statute that impairs a contract. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 19-21 n.17. What, then, is the contract involved in *Allied*? The Court indicates that the contract at issue was the employer-employee contract that required the company to pay money to its employees for work done, and the part of the contract at issue is the pension plan. Can this be characterized as a contract? Contract is often defined as "a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." I S. WILLISTON,

the *Allied* Court identifies as impaired by the Pension Act would not even traditionally be defined as a term of a contract.[191] The challenged statute actually impairs the contractually based expectations of the parties. Although in isolation, the distinction between impairing a term and impairing an expectation of contract may sound like a semantic game, in application, this distinction expands the reach of the contract clause prohibitions. In *Allied*, the contract impaired was an employment contract between the company and its employees. A generous interpretation of this contract would allow it to be construed to include the company's pension plan, as well as other fringe benefits of employment. So interpreted, the contract required the company to pay X amount of dollars to each employee for salary and fringe benefits. The Minnesota Pension Act did not prevent the company from paying X amount, nor did it prevent any employee from fulfilling his obligations assumed in the contract. In reality, the Pension Act allowed the parties to perform upon their agreed duties. What the statute did, which the Court interpreted as an impairment, was to alter the expectations of the parties that were based on the contract. Thus, the statute required the company to pay the agreed upon amount, X, to the employee for salary and fringe benefits, and added a new obligation to the company, to pay an extra amount, Y.[192] Because the statute required the company to do

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CONTRACTS § 1 (3d ed. W. Jaeger 1957). Can the pension plan be termed a contract, or even a basis for contractual expectations? The pension plan instituted by the company was voluntarily established. The company retained a complete right to terminate or modify the plan at any time, excepting rights already vested under the plan and contributions already made to the pension fund. If the company terminated or modified the plan, the company would not be liable to any employee not having vested rights under the plan, *see* note 99 *supra*, nor would the employees have any diminution of their duties. 438 U.S. at 236-40. Further, the employees would have no right of action against the company for termination or modification of the plan. Thus, the pension plan does not satisfy Williston's definition of a contract, because there is no legal sanction for the nonperformance of these duties. Since performance of the apparent promise is optional with the promisor, this "contract" could be construed as illusory. *See* Corbin, *The Effect of Options on Consideration*, 34 YALE L.J. 571 (1925); Patterson, *Illusory Promises and Promisor's Options*, 6 IOWA L. BULL. 129 (1920).

191. The Court identifies the disruption of expectations based on the pension plan as the impairment. 438 U.S. at 245-47. *See* note 191 *supra*.

192. The dissent noted that "the Act will impose only minor economic burdens on employers whose pension plans have been adequately funded." 438 U.S. at 253 (Brennan, J., dissenting). Only minor economic burdens should occur because contributions were to be made based on actuarial predictions for all employees. *Id.* at 237. The Pension Act did not alter the amount to be contributed, but only superimposed a different vesting date, after which unforeseen contingency could not be a basis to deprive pension fund benefits. Thus, since the company had, at least theoretically, already made pension plan contributions for these employees, there only would be minor economic burdens. Indeed, this burden could be offset by the contributions the company had made to the plan for employees whose rights would not vest, even under the ten-year Pension Act provision.

more than it had expected to do, based on the contract, the Court held the statute invalid as impairing the obligation of contract.[193]

Had the Court used the traditional inquiry,[194] rather than this contractual expectations approach, it seems likely that the Pension Act would not have been held to impair the obligation of contract. The Pension Act did not prevent, or make unduly difficult, the performance, by any party, of the duties undertaken by the contract. Rather, the Pension Act created additional duties for one party to the contract, independent of the terms of the contract.[195] It was not the contract itself that was significant in creating the duty, but the existence of the relationship between the employer and employee. It was the existence of a specific relationship that enabled the Pension Act to be applied to the company. In holding that the Pension Act violates the contract clause because it changed the expectations of the parties,[196] the Court has established a novel and expansive interpretation of the clause, and extended it to protect expectation and reliance interests arguably related to, but not themselves governed by a contract.

United States Trust, while using language of the "contractual expectations" doctrine,[197] did not apply the doctrine in the manner used by the *Allied* Court. *United States Trust* did not extend the inquiry beyond the contract terms. Rather, the inquiry focused on the actual terms of the contract. The expectation inquiry, unlike that in *Allied*, was not directed at what the parties expected their relationship would be because of the contract, but rather, it was directed toward what modifications the parties could have expected from legislative actions.[198] In thus directing the inquiry, the *United States Trust* Court

193. *Id.* at 250-51.

194. *See, e.g.*, City of El Paso v. Simmons, 379 U.S. 497 (1965). The contract clause was intended by the Framers to be applicable only to laws that altered the obligation of contract by relieving one party to the contract of the obligation to perform a contractual duty. *See* notes 7-10 *supra* and accompanying text.

195. Of course, it could be argued that the duty to pay additional money to the employee pension plan was not independent of the contract, because the Pension Act adds these duties based on an already existing plan. However, the Pension Act did not prevent either of the parties to the contract from performing their duties. 438 U.S. at 256 (Brennan, J., dissenting). The Act simply created additional duties, beyond those which the parties were bound by contract to perform. *See* note 191 *supra*.

196. 438 U.S. at 250-51.

197. 431 U.S. at 19-21 n.17 ("a more particularized inquiry into the legitimate expectations of the contracting parties.").

198. *Id.* at 21.

> The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies

acted consistently with the *Blaisdell* interpretation of the contract clause. Because, after *Blaisdell*, the question of whether the contract clause had been violated could not be answered by merely showing an impairment of contractual obligation,[199] the focus on expected changes aided in determining if a statute impairing a contract was constitutional. If the change could be shown to be reasonably expected by a party when the contract was adopted, then no constitutional violation would result from the impairment.[200] By focusing on the terms of the contract and expected changes in those terms, *United States Trust* continues in the traditional contract clause approach, that the contract clause protects from modification those things that the parties agree to do.

The different applications of the expectation inquiry in *United States Trust* and *Allied* indicate the expansion of the contract clause in *Allied*. *United States Trust* continues to focus on the terms of the contract, and on changes that could be expected to those terms, while *Allied* focuses on the expectations of the parties that arise from their contractual relationship. The broader focus in *Allied* is certain to expand the reach of contract clause prohibitions, particularly in those instances in which social legislation creates additional duties on certain classes of persons. The impact of this expanded reach can be seen most vividly in the employment area. Positive social legislation permeates the employment area, continually adding to the duties of the employer.[201] If this creation of additional duties can be shown to modify the expectations of the employer,[202] then the contract clause protections will be invoked.

The "expectations" inquiry adds yet another element to contract clause analysis. This test is highly manipulable. The Court has enunciated no standards by which it is to determine whether a particular piece of legislation is expected. For example, with the Minnesota Pension Act, Minnesota had enacted much legislation in the employee/employer field, and it could clearly be expected that they might enact more. The Court does not say what makes this legislation unexpected. Further, it is likely that the most unexpected laws will be those

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is much less likely to upset expectations than a law adjusting the express terms of an agreement.

199. *See, e.g.*, Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942); Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940).

200. 431 U.S. at 19-21 n.17.

201. Some examples are workers' compensation laws, minimum wage laws, state disability insurance, and unemployment compensation.

202. 438 U.S. at 49-50. A law that requires an individual to pay more money than originally anticipated can invariably be construed as disrupting expectations.

necessitated by emergency situations, and those that will satisfy the Court's requirement of grave need for the legislation. These, however, will fail to survive constitutional scrutiny under the "expectations" test.

Had the *Allied* Court continued to focus on the terms of the contract, the results of the challenge to the Pension Act probably would have been different. Because the Pension Act did not dilute or abrogate any duties assumed by the parties in their contract, a traditional analysis would probably find no impairment of contract within the meaning of the contract clause. If the contract clause issue did not exist, either the parties would have to challenge the legislation on another basis or the suit would be dismissed. Most likely, the Pension Act would be challenged under the due process clause of the fourteenth amendment. Under such a challenge, the Court, if acting consistently with due process theories governing economic legislation, could only invalidate the statute if it appeared arbitrary or irrational. The Court would be unable to escape the inevitable comparison between *Allied* and *Usery v. Turner Elkhorn Mining Co.*[203] *Turner Elkhorn Mining* involved national legislation that imposed unexpected, sudden and substantial liability on mine owners. The legislation was upheld despite the due process challenge. In upholding the legislation, the Court noted that even retroactive legislation, when subject to a due process challenge, must stand unless the challenger can show it to be arbitrary or irrational.[204] Applying the Court's reasoning in *Turner Elkhorn Mining* to the facts in *Allied*, it can be seen that the company in *Allied*, if alleging a due process violation, would have to show that the statute was arbitrary or irrational. Decisions from the Court since the 1930's illustrate the difficulty in carrying this burden.[205] It is a rare situation when a litigant can establish that the legislature had no rational basis for enacting the challenged legislation. It can be assumed that in *Allied* the state could have come forward and shown some rational basis for the Pension Act.[206] All indications are that, had the Pension Act been challenged as violating due process, the challenge would have failed. Thus, the expanded application of the contract clause can be seen to provide

203. 428 U.S. 1 (1976).

204. It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Id. at 15.

205. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963).

206. 438 U.S. at 247. "Yet there is *no showing* in the record before us that this severe

greater protection for contract-related property rights than that provided by the traditional post-*Blaisdell* interpretation or by a due process analysis.

Intimately related to the Court's expansive application of the contractual expectations doctrine is the *Allied* Court's holding that an enlargement of a contractual obligation can equal an impairment.[207] The Court's protection of contractual expectations depends upon its holding that enlargement of a contractual obligation may be an impairment. A statute that diminishes or dilutes the expectations of the parties would invariably negate or dilute some duty of a party assumed in the contract terms. A statute that changes the parties' contractual expectations, however, without changing the terms of the contract or without preventing performance of contractual duties, will inevitably enlarge the obligation of contract. Thus, the holding that an enlargement can equal an impairment is necessary to give practical effect to the Court's application of the contractual expectations doctrine.

The *Allied* Court was unable to rely on any authority emanating from the *Blaisdell* era to support its holding that an enlargement equals an impairment.[208] Therefore, the Court was forced to obtain its support in earlier cases and could cite only two cases that embraced this theory other than in dictum.[209] *Detroit United Railway v. Michigan*[210] and *Georgia Railway & Power Co. v. Decatur*[211] directly support the

disruption of contractual expectations was necessary to meet an important general social problem." *Id.* (emphasis added).

Although the majority asserts that there was no showing of need, the dissent, as well as the district court and the Minnesota Supreme Court, found that the statute was needed to remedy a social problem arising from the operation of private pension plans. Further, Congress recognized the need for some legislative guidelines with private pension plans, and enacted the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* (1975).

The Minnesota Supreme Court decision, Fleck v. Spannaus, 251 N.W. 2d 334, 338 (Minn. 1977), the district court decision, Fleck v. Spannaus, 449 F. Supp. 644 (D. Minn. 1977) (mem.), as well as the Supreme Court dissent, 438 U.S. at 251-56, all recognize that the termination of operations by an employer can cause an employee to lose anticipated pension benefits. *See also* Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 HARV. L. REV. 952 (1963). When the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants, this problem of plant closure and pension plan termination was brought to the attention of the Minnesota Legislature. 449 F. Supp. at 651.

207. 438 U.S. at 244-45 n.16.

208. *Id.*

209. *See* Hale, *supra* note 7, at 514-16. The Court cited eight cases as support for the proposition that an enlargement of an obligation equals an impairment. Only two of these cases, Detroit United Ry. v. Michigan, 242 U.S. 238 (1916), and Georgia Ry. & Power Co. v. Decatur, 262 U.S. 432 (1923), embraced this theory in more than dicta.

210. 242 U.S. 238 (1916).

211. 262 U.S. 432 (1923).

proposition that an enlargement is an impairment within the meaning of the contract clause. Nevertheless, the strength of these two cases as authority may be viewed[212] as greatly diminished by the realization that these cases are products of the substantive due process era,[213] and are contrary to an earlier interpretation that expressly disapproved of the notion that an enlargement can equal an impairment.[214] Both *Georgia Railway* and *Detroit United Railway* involve railway companies that had contracts with municipalities to provide service at a specified rate within city limits. In both cases, after the contracts were made and performance begun, the cities expanded their boundaries. The municipalities then insisted that, after expansion, the railway companies provide service at the contract rate to the annexed areas. In both cases the Court held that forcing an extension of the contract rate to these annexed areas impaired the obligation of contract by enlarging the obligation.[215] These holdings lent the needed support to the *Allied* assertion that an enlargement equals an impairment.

Both cases, however, are distinguishable from *Allied*. Each involved a contract to which the government was a party and the challenged legislation was enacted in the government's interest. In such cases, as was noted in *United States Trust*, it is appropriate that the Court take a stricter view. The railway cases also reflect the popular attitude of their time. Both cases were decided during the substantive due process era, when the Court was extremely protective of property rights. The decline of the substantive due process theories brought a substantial decline in the protections of property rights,[216] and those declines make the railway cases questionable authority. Further, *Satterlee v. Matthewson*,[217] an earlier contract clause case, expressly holds that an enlargement of obligation does *not* equal an impairment. *Satterlee* is more directly applicable to the *Allied* case because *Satterlee* involves a statute that affected a contract between private individuals, while the other two cases involve the state as a party to the contract. Because the state was not a party to the contract, no stricter scrutiny was required. In

212. 438 U.S. at 259 n.7 (Brennan, J., dissenting) ("These opinions reflect the then-prevailing philosophy of economic due process which has since been repudiated.").

213. *Detroit United Ry.* was decided in 1916 and *Georgia Ry. & Power* was decided in 1923. *See* notes 209-11 *supra*. The substantive due process era was in full force between Lochner v. New York, 198 U.S. 45 (1905), and Nebbia v. New York, 291 U.S. 502 (1934).

214. Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380 (1829).

215. Detroit United Ry, v. Michigan, 242 U.S. 238, 253 (1916); Georgia Ry. & Power Co. v. Decatur, 262 U.S. 432, 439 (1923).

216. *See* cases cited in note 201 *supra*. *See also* Strong, *The Economic Philosophy of Lochner: Emergency Embrasure, and Emasculation*, 15 ARIZ. L. REV. 419, 449-55 (1973).

217. 27 U.S. (2 Pet.) 380 (1829).

Satterlee, a Pennsylvania statute giving validity to a contract that was invalid when made was not held to violate the contract clause. "[I]t is not easy to perceive," said Justice Washington, "how a law which gives validity to a void contract, can be said to impair the obligation of that contract . . . . [I]t surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing."[218] Since treating something as a contract where none previously existed does not violate the contract clause, it should follow that creating an obligation where none previously existed does not violate the contract clause.[219] If it is found that the creation of the new obligation results in a deprivation of property, the basis of the challenge to the statute causing this deprivation should be the due process clause, not the contract clause.

The actual effect of the Court's holding, that an enlargement of obligation can equal an impairment[220] of obligation, is almost certain to be substantial. Legislation is continually adding to duties already existing, particularly in the employment area.[221] When legislative enactments increase the duties the parties have undertaken by contract, or expectations they have derived from contract, the legislation will be vulnerable to contract clause challenges.

IV. CONTRACT CLAUSE LITIGATION: WHAT THE FUTURE HOLDS

Allied and *United States Trust* put to rest speculation that the contract clause is a "dead letter" of the Constitution. But these cases go beyond that. Together they elevate property grounded in contract to a favored status in the law, and provide more protection for this type of property than property in other forms. This will undoubtedly increase contract clause challenges to state legislation. Moreover, the expansive theories of *Allied* will create a desire among litigants to have their property considered a product of contract. Thus, litigants will be continually urging an expansive view of contract.

Another effect of these two cases will be inconsistent treatment of property depending on what form that property takes and whether the challenged legislation is a state or federal statute. Thus, individuals

218. *Id.* at 412-13.

219. *See* Hale, *supra* note 7, at 514-16. *See also* 438 U.S. at 258-59 (Brennan, J., dissenting).

220. 438 U.S. at 244-45 n.16.

221. *See id.* at 255 (Brennan, J., dissenting); *id.* at 243-44 (citing United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977)). *See e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 5 (1976) (suit challenging Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 901 *et seq.* (1970 & Supp. IV)).

will feel a need to have a contract to ensure that their position is less vulnerable to state legislation.

The future is actually uncertain in many areas. The Court could easily, in the next contract clause case, confine *Allied* to its facts, or find the case was merely an instance of a statute being unconstitutional as applied, rather than as being unconstitutional on its face. So long as *Allied* remains as authoritative precedent, however, there will remain a double standard in economic legislation, and the standard used will depend on the form, rather than the substance, of property in a particular case.

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